

SOUTH AFRICA / JUDGMENT

De Wet & Others v Opis Advisory (Pty) Limited & Others (2020-14081) [2024]

ZAGPJHC 174 (27 February 2024)

[2024] ZAGPJHC 174

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

2020-14081

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

1. NOT

REPORTABLE

2. NOT

OF INTEREST TO OTHER JUDGES

CASE NO: 2020-14081

DATE: 27th February

2024

In the matter between:

DE WET,
GERT LOUWRENS STEYN N O
First Applicant
LEDWABA,
CAROLINE MMAKGOKOLO N O
Second Applicant
BAPO GREIGHT & LOGISTICS (PTY)
LIMITED
(In
Liquidation)
Third Applicant
and
OPIS ADVISORY
(PTY) LIMITED First
Respondent
SONO,

SIPHO N O
Second Respondent
WESTERN PLATINUM
(RF) LIMITED
Third Respondent
EASTERN PLATINUM
(RF) LIMITED
Fourth Respondent
THE MASTER OF
THE HIGH COURT, MAHIKENG
Fifth Respondent

Neutral Citation: De Wet N O and Others v Opis Advisory and Others
(2020/14081) [2024] ZAGPJHC --- (27 February 2024)

Coram: Adams J

Heard on: 14 February 2024
Delivered: 27
February 2024 – This judgment was handed down electronically by
circulation to the parties' representatives by email, by
being
uploaded to CaseLines and by release to SAFLII. The date and
time for hand-down is deemed to be 12:30 on 27 February 2024.

Summary: Company – business rescue, followed by
liquidation proceedings – payment made by company after
liquidation application
issued – payment made by Business
Rescue Practitioner constituting void disposition – factual
issue to be decided on
the basis of the Plascon
Evans principle – BRP's
version rejected as far-fetched and unsustainable – payment
amounts to void disposition –
Companies Act 61 of 1973, s
341(2) – application granted and repayment of amount order.
ORDER
(1) The payment of R3 million
made by the third applicant, Bapo Freight and Logistics (Pty) Limited
(in liquidation) ('Bapo
Freight'), on 28 June 2019 to the
first respondent, Opis Advisory (Pty) Limited, and/or to the second
respondent, Mr Sono,
from Bapo Freight's bank account, be and
is hereby declared void in terms of the provisions of section 341(2)
of the Companies
Act, Act 61 of 1973.
(2) Opis Advisory (Pty) Limited
and/or Mr Sono is directed to pay to the applicants the amount of R3
million, together with
interest thereon at the applicable legal rate
of interest from 28 June 2019 to date of final payment.

(3) The first, the second, the third and the fourth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this application.

JUDGMENT

Adams J:

[1]. The first and the second applicants (the Liquidators) are the duly appointed joint liquidators, in terms of certificate of appointment dated 18 October 2019, of the third applicant (Bapo Freight), which was placed under final winding-up on 11 July 2019 by order of the Mahikeng High Court. Prior to the winding-up of Bapo Freight, it was in business rescue by virtue of a resolution passed by its board of directors on 30 January 2019. The second applicant (Mr Sono) was officially appointed as the business rescue practitioner to oversee the business of Bapo Freight during the business rescue proceedings. This Mr Sono

did through his company, the first respondent (Opis Advisory).

[2]. On 28 June 2019 – about thirteen days prior to the issue of the order by the Mahikeng High Court for the liquidation of Bapo Freight – the said company paid to Opis Advisory and/or Mr Sono an amount of R3 million. The application for the winding-up of the company was issued on 24 June 2019. The aforesaid payment of R3 million was therefore made after the presentation of the liquidation application to the Registrar of the Mahikeng High Court.

[3]. The said payment, which was made on behalf of Bapo Freight by Mr Sono, who was the Business Rescue Practitioner at the time, was purportedly received into the trust account of Opis Advisory or that of Mr Sono on behalf of the third and/or the fourth respondents as a refund of monies advanced to the company in business rescue specifically to assist with the business rescue. The parties refer to the third and the fourth respondents collectively as Lonmin and I shall do likewise. As Mr Sono puts it in a letter he addressed to the liquidators on 13 November 2019: -

‘As you know, I indicated to you that R3 000 000 held in my trust account is not an amount due to [Bapo Freight] for any services rendered by [it]. It is an amount I specifically instructed Lonmin to advance so that I could pay retrenchments that were to be effected if the business rescue plan was approved and implemented. Lonmin has to agree to the release of the funds if they are to be paid to any party other than themselves. Please take this up with them and resolve, one way or the other.’

[4]. In this application, the liquidators apply for an order declaring the aforesaid payment of R3 million to be void in terms of the provisions of s 341(2) of the Companies Act[1]. They also apply for an order compelling the repayment of the said sum, together with interest thereon. Section 341(2) of the Companies

Act provides as follows: -

‘341 Dispositions and share transfers after winding-up void

(1)

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.’

[5]. The third and the fourth respondents (Lonmin) oppose the application and contends that the R3 million payment falls outside of the ambit of s 341(2). Accordingly, the issue to be considered in this application is whether the said disposition should be avoided on the basis of the said section. Put another way, the issue to be considered in this application is whether the said payment made by Bapo Freight, after commencement of winding-up proceedings, is an impeachable disposition as envisaged by s 341(2) of the Companies Act.

[6]. As already indicated supra, on 28 June 2019 Mr Sono caused payment of R3 million to be made from Bapo Freight’s business account into his trust account, leaving a credit balance of approximately R382 000 in the business account of Bapo Freight.

[7]. Lonmin admits that the contested payment was made after commencement of winding-up proceedings. It avers, however, that the said sum was always ‘ring-fenced’ and was never intended to become the property of Bapo Freight, which rendered services to Lonmin in the form of the supply of ore. When Bapo Freight was in business rescue, so Lonmin claims, it advised Mr Sono that it (Lonmin) ‘would make various payments to [Bapo Freight] to assist it during its business rescue process up till and including the adoption of a business rescue plan’. These payments were made to ensure the continuation of ore supply.

[8]. At the commencement of the business rescue, Lonmin was owed R53.9 million by Bapo Freight. During the period that it was in business rescue, Lonmin claims to have made various payments to Bapo Freight. The contested R3 million, says Lonmin, ‘forms part of a R10 million commitment made by Lonmin’ to Mr Sono ‘to support the business rescue process’. On 20 June 2019 Lonmin paid R5 132 354.96 to Bapo Freight, R4 million of which was part of the R10 million pledged. The R4 million would be paid into Bapo Freight’s account ‘and would be used by the business rescue practitioner in the business rescue process in order to effect payment to various employees as well as to effect payment of ancillaries’.

[9]. This is the version of Lonmin. The aforesaid sum of R5 132 354.96, according to Lonmin and Mr Sono, was not a loan to Bapo Freight ‘as the monies at all times remained Lonmin funds’. In the event of those funds not being utilised and the business rescue not proceeding, it was to be paid back to Lonmin. In sum, the version of Lonmin, supported by Mr Sono, is to the effect that the funds from Lonmin were to be regarded as ‘post commencement finance’ or PCF.

[10]. The factual question to be considered is simply whether this version of Lonmin should be accepted by the Court. In deciding that question, it should be borne in mind that this is an application and factual disputes are to be decided on the basis of the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited*[2].

[11]. The general rule is that a court will only accept those facts alleged by the applicant which accord with the respondent's version of events. The exceptions to this general rule are that the court may accept the applicant's version of the facts where the respondent's denial of the applicant's factual allegations does not raise a real, genuine or bona fide dispute of fact. Secondly, the court will base its order on the facts alleged by the applicant when the respondent's version is so far-fetched or untenable as to be rejected on the papers.

[12]. It is necessary to adopt a robust, common-sense approach to a dispute on motion. If not, the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. A Court should not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

[13]. In casu, the contested payment was not made to Lonmin or an existing creditor of Bapo Freight. Mr Sono or his company was the recipient, and he did not receive payment on account of a debtor / creditor relationship. The contested payment was made after the commencement of the winding-up, which means that the default position should prevail, namely that the payment is void unless the court otherwise orders. In that regard, the SCA held as follows in *Eravin Construction CC v Bekker NO and Others*[3]: -

‘Section 341(2) of the old Act states expressly that a disposition in the terms contemplated by it “shall be void”. The recipient has no right, on this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received.’

[14]. Neither Mr Sono nor Lonmin seeks validation of the contested payment. They merely contend that the money ‘belongs’ to Lonmin.

[15]. The difficulty with Lonmin’s version is that on 20 June 2019, R5 132 354.96 was paid into Bapo Freight’s business account, but no details are provided by Lonmin as to the computation of this amount. It allegedly included an amount of to R4 million which was part of the R10 million pledged. Before business rescue proceedings commenced, Lonmin already was a creditor of Bapo Freight and was owed an amount of R53.9 million by it. On 14 June 2019 (being the date of Mr Sono’s report) Lonmin already advanced R12.1 million as PCF and it committed a further R10 million PCF, conditional upon the BRP being adopted. Lonmin allegedly waived its right to repayment of its PCF, provided the BRP is adopted. If the BRP was not adopted and Bapo Freight is liquidated, Lonmin reserved the right to prove its claim in full.

[16]. Even on this version of Lonmin, and assuming the R3 million formed part of the R5.132 million that was paid into Bapo Freight's business account on 20 June 2019, then absent an adopted BRP and Bapo Freight's subsequent liquidation, Lonmin is left only with a concurrent claim against the applicants.

[17]. Section 135(2) of the new Companies Act[4] provides as follows with reference to PCF:

'(2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing –

- (a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
- (b) will be paid in the order of preference set out in subsection (3)(b).'

[18]. Subsection (3)(b) in turn provides as follows:

'(3) After payment of the practitioner's remuneration and costs referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated –

- (a)
- (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.'

[19]. More importantly, however, are the provisions of section 135(4), which reads thus: -

'(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.'

[20]. The new Companies Act therefore makes it clear that PCF, in the event of liquidation of a company under business rescue, is regarded as a claim against the so liquidated company, ranking second to the BRP's claim for remuneration. The simple point is that, even if the version of the Lonmin is to be accepted, it is still not entitled to retain the repayment of the PCF. Its claim would rank as provided for in section

135. This means that the R3 million, being a void disposition, should be returned to the liquidated company.

[21]. The bigger difficulty with the version of Lonmin is that same is highly improbable at best. As submitted by Mr Lubbe, who appeared on behalf of the applicants, the details or proof of the alleged agreement 'insofar as the usage of the funds' is concerned, were strikingly absent from its narration. The question to be asked and which remains unanswered is when, where, how and by whom was the alleged agreement concluded. Perhaps more conspicuous is the complete lack of any detail regarding the alleged ring-fencing of the contested amount.

[22]. Moreover, the R5.132 million was paid into Bapo Freight's business account and there is no explanation why the R4 million (allegedly destined towards the pledge of R10 million), was not paid into a separate account (a 'ring-fenced account') and administered by Mr Sono for and on behalf of Lonmin. More telling, however, is the rhetorical question why the supposed 'ring-fenced' amount was not paid directly into Mr Sono's trust account and separately designated.

[23]. Neither Lonmin nor Mr Sono provides any detail on how the R3 million is to be expended or how it is computed. The amount, by sheer coincidence, equated approximately to the credit balance standing to the business of Bapo Freight at the time of the payment. No explanation is given as to why the R3 million was paid from Bapo Freight's account after commencement of the liquidation proceedings, and, why it was paid despite Mr Sono having had knowledge of the proceedings.

[24]. For all of these reasons, I conclude that the version of Lonmin and Mr Sono is so far-fetched and so untenable that it can be rejected on the papers. This then means that the payment of R3 million is a disposition which falls squarely within the ambit of s 341(2) of the Companies Act. The said payment stands to be declared void and repayable to Bapo Freight.

Costs

[25]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[5].

[26]. I can think of no reason why I should deviate from this general rule.

[27]. I am therefore of the view that the third and the fourth respondents should pay the applicants' costs of this application.

Order

[28]. Accordingly, I make the following order: -

- (3) The first, the second, the third and the fourth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this application.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 14th February 2024

JUDGMENT DATE: 27th February 2024

FOR THE FIRST, SECOND AND THIRD APPLICANTS: Adv J Lubbe

INSTRUCTED BY:

Rudolph Van Niekerk

Attorneys, Johannesburg

FOR THE THIRD AND FOURTH RESPONDENTS:

Adv H C Bothma SC,

together with Adv A Chetty

INSTRUCTED BY: Webber

Wentzel, Sandton

FOR THE FIRST, SECOND AND FIFTH RESPONDENTS: No appearance

INSTRUCTED BY:

No appearance

[1] Companies Act, Act 61 of 1973.

[2] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited

[1984] ZASCA 51; 1984 (3) SA 623 (A).

[3] Eravin Construction CC v Bekker NO and Others 2016

(6) SA 589 at [21].

[4] Companies Act, Act 71 of 2008.

[5] Myers v Abramson 1951(3) SA 438 (C) at 455.

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